IN THE

Supreme Court of the United States

October Term, 1948.

No. 357

NATIONAL BANK OF COMMERCE OF SAN ANTONIO, INDEPENDENT EXECUTOR AND TRUSTEE OF THE ESTATE OF W. G. HIGGINS, DECEASED,
PETITIONER,

versus

FRANK SCOFIELD, COLLECTOR OF INTERNAL REVENUE,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and Brief in Support of Petition for Writ.

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LODOVIC PRINTING CO., SAN ANTONIO, TEXAS

SUBJECT INDEX

PETITION FOR WRIT OF CERTIORARI.

BRIEF IN SUPPORT OF PETITION.

LIST OF AUTHORITIES

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioner, National Bank of Commerce of San Antonio, Independent Executor and Trustee of the Estate of W. G. Higgins, deceased, respectfully shows:

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

This suit by petitioner was for the recovery of estate taxes which were levied on the full net community estate of Col. W. G. Higgins and his wife (26 U. S. C. A., Sec. 811, as amended by Act of October, 1942) without any deduction; Col. Higgins having died February 10, 1943, while a resident of San Antonio, Texas (R. 27, 45, 19). Judgment was rendered by the district court that petitioner take nothing (R. 314), and the Circuit Court of Appeals affirmed and then overruled a motion for rehearing without opinion. (R. 322, 329, 335). Circuit Judge Hutcheson dissented, writing a much fuller opinion that the majority (R. 325). 169 Fed. (2) 145.

Petitioner claims that, because of the Commissioner's refusal to allow deduction of the value of a trust for charitable purposes (26 U. S. C. A., Sec. 812[d]), provided for in decedent's will, the taxes had been overpaid, urging that the direction in the will to maintain the widow, liberally "provided with the necessities and comforts in life to which she is accustomed" (R. 15), fixed a definite standard, within the rule of *Ithaca Trust Co. v. United States*, 279 U. S. 151, 73 L. Ed. 647, 49 S. Ct. 291, and that *Merchants National Bank v. Commissioner*, 320 U. S. 256, 88 L. Ed. 35, 64 S. Ct. 108, is clearly distinguishable. (R. 27).

This contention is sustained by the dissenting opinion herein (R. 324), being necessarily inherent in its holding that on this standard there was no probability of invasion of the principal devised.

The defense (R. 36) is that the cost of the maintenance of the widow, as provided in this will, was not "presently ascertainable, and hence severable" (Treas. Reg. 105, Sec. 81.44), in spite of the fact that the trial court found and

the undisputed evidence establishes (a) that when the will was made and thereafter until decedent died, such cost of maintenance was about $320.00 per month (R. 310, 104, 140, 135); and (b) that at the same time the income from the community estate of the decedent and his wife was about $620.00 per month (R. 310, 99, 108, 138).

The majority opinion (R. 323), apparently proceeding upon the idea that the construction of a will presents a question of fact, concludes that under this will the widow had an unlimited right to choose her home and the trustee had an "uncontrolled discretion" in providing a home for her. Yet the determinative facts here are utterly undisputed and the will reasonably implies a restriction in her choice of a home, according to her existing standard of living, and permits an invasion of the principal by the trustee alone, authorizing only its use of "such reasonable sums" as it "may deem necessary for the carrying out of the provisions" of the will. (R. 15).

THE UNDISPUTED DETERMINATIVE FACTS.

The following are all of the relevant facts in evidence:

The will of Col. Higgins (R. 13-8, 45), after declaring that all of the property of himself and his wife, Mary J. Higgins, is community property, and that he is disposing only of his one-half thereof, leaves everything to petitioner, as trustee, with full power in disposition and management of the estate, but charged with the duties set forth in subdivisions (b), (c), (d) and (e) of the will; also naming petitioner as independent executor.

The first two of these subdivisions direct the payment to a sister, Mary Jane Higgins, of the sum of $250.00, and to a niece, Mrs. Evelyn M. Dodge, the sum of $200.00, and, in addition, to the sister "$50.00 per month during the remainder of her life" and to the niece "$200.00 per month for and during the term of her life," and as to each of these

the testator further provides that "this bequest shall first be paid out of income, if sufficient, otherwise, out of the principal of my estate."

The crucial subdivision (d)* provides as follows:

> "My said trustee shall liberally provide for my beloved wife, Mary J. Higgins, maintaining her in our home or a location of her choosing, provided with the necessities and comforts in life to which she is accustomed; and my trustee may use such reasonable sums from the principal from time to time as it, in its sole discretion, may deem necessary for the carrying out of the provisions of this paragraph, so long as she may live." (R. 15).

Subdivision (e) provides that when those above mentioned "shall have passed on, then the remainder of my estate shall be divided" between Protestant Orphans' Home of San Antonio and St. Peter's-St. Joseph's Home, the Catholic orphanage of San Antonio (R. 15), the first of which was a corporation organized and operated exclusively for charitable purposes (R. 46, 52-5), and the second a trust so organized and operated (R. 56-8), and both charitable organizations within the requirements of 26 U. S. C. A., Sec. 812(d), functioning only in Texas. (R. 164). This is not questioned by either of the courts below nor by respondent.

The will of Col. Higgins was on March 3rd, 1943, duly probated by the County Court of Bexar County, Texas, which found that he died Feb. 10, 1943, while residing in San Antonio, Texas, where his principal estate was situated, and letters testamentary issued to petitioner (R. 19-20, 45-6). Thereupon, the entire community estate was administered together by petitioner. (R. 40, 289).

The trial court found the facts in substance as follows**:

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* Reference in foot-note of dissenting opinion to "Subd. (e)" (R. 326) was evidently intended to be "Subd. (d)."

** For convenience, we have numbered the findings and given supporting record references.

1. Col. Higgins was survived by his wife, Mary J. Higgins, then eighty-two years of age (born December 2, 1860), his sister, Mary Jane Higgins, then eighty years old (born September 16, 1862), and his niece, Evelyn M. Dodge, then forty years old (born January 27, 1903), his wife dying on August 1, 1943. (R. 309, 310-11, 268, 74, 78).

2. The annual payments directed by the Higgins will to be made to the sister and niece total $3,000.00 ($50\times12 + 200\times12$). (R. 310).

3. "There is evidence that at the time the will was made (September 17, 1942), and thereafter until decedent died (February 10, 1943), the cost of maintaing Mrs. Mary J. Higgins in the manner provided for in her husband's will * * * ('liberally * * * provided with the necessities and comforts in life to which she is accustomed') was about $320.00 per month. (R. 310). This is supported by Col. Higgins's budget, dated February 20, 1942 (R. 109, 135), as found in the Colonel's safe after his death by his attorney, Cadwallader, in a personal record book (R. 76, 81-2), and the testimony of his attorney showing appropriate adjustments of the Colonel's budget by deductions on account of his death about a year later (R. 104, 106, 137-8, 140); Col. Higgins being a very meticulous, forward-looking person (R. 106).

4. "The evidence further shows that at the time of decedent's death and for some years prior thereto the income from the community estate was approximately $620.00 per month, and that neither decedent nor his wife was extravagant in their mode of living during the latter part of their lives." (R. 310). This is supported by the Colonel's showing in his personal record book of his 1942 income, as also testified to by his attorney (R. 76, 99, 137-8).

5. On October 9, 1943, petitioner made an estate tax return and, after notice and demand and deficiency notice, paid under protest a total tax of $12,826.07 (R. 308-9, 167-8, 203-7), for which amount, or such lesser sum as is refundable, on July 18, 1944, it filed a written claim for refund, setting up the specific grounds of petitioner's amended complaint, and no action having been taken thereon by the Commissioner meantime, and none of the amount sought repaid, this suit was instituted on October 27, 1945, as permitted by Section 3772(a)(2) of the Internal Revenue Code, as amended by Section 503 of the Revenue Act of 1942 (R. 309, 207-16, 217).

It further appears without dispute that, at the time of Col. Higgins's death, his wife's health was not good (R. 78); that on the same date that her husband made his will, she made a will, leaving most of her estate to petitioner, in trust, for the same purposes as her husband (R. 286-8), and that petitioner, following the death of Col. Higgins, administered the community estate of him and his wife as a unit (R. 289); that after his death she never left the home, except to go to the cemetery a few times. (R. 146).

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. A., Section 347. In this cause a final judgment was rendered by the United States Circuit Court of Appeals for the Fifth Circuit on July 21, 1948, affirming the judgment of the United States District Court for the Western District of Texas, Austin Division, of June 10, 1946, against petitioner (R. 314), said judgment being in an action by petitioner against Frank Scofield, as the Collector of Internal Revenue, for money had and received by him, which action arose under the Revenue Laws of the United States (28 U. S. C. A., Sec. 41) and was for the sum of $12,826.07, alleged to have been illegally assessed and collected from petitioner by respondent

(R. 27-34), duly following filing of proper claim for refund (R. 207-17). On August 9, 1938, being within the time permitted by Rule 29 of said Circuit Court of Appeals, petitioner duly filed in that court a petition for rehearing, with supporting argument, which was considered and overruled by that court, without further opinion, on September 11, 1948 (R. 330, 335).

The majority and the dissenting opinions of the Circuit Court of Appeals are to be found in the Record, pages 322, 324, same being also reported in 169 Fed. (2) 145. The opinion of the trial court has never been published but is to be found in the Record, pages 302-13.

All of the "Questions Presented", as herein next shown, were properly raised in petitioner's brief in the Circuit Court of Appeals, as well as in its petition for rehearing, (R. 330).

The grounds upon which it is contended that this Court should grant the writ herein are enumerated under "Reasons Relied upon for Allowance of the Writ."

QUESTIONS PRESENTED.

1: Whether or not a will, directing a trustee, to which everything is left, to make certain fixed monthly payments to specified relatives, "out of income, if sufficient, otherwise out of the principal", and further directing:

> "My said trustee shall liberally provide for my beloved wife, Mary J. Higgins, maintaining her in our home or a location of her choosing, provided with the necessities and comforts in life to which she is accustomed; and my trustee may use such reasonable sums from the principal from time to time as it, in its sole discretion, may deem necessary for the carrying out of the provisions of this paragraph, so long as she may live", and providing that when the wife and the named relatives "shall have

> passed, then the remainder of my estate shall be divided" between two specified charitable institutions,

fixes a standard for the calculation of the value of the widow's use, under federal estate tax law, when the undisputed evidence shows that, at the time of the making of this will and thereafter until the death of the testator, the cost of maintaining the wife in the manner provided for in her husband's will was about $320.00 per month, she being, at the time of his death, eighty-two years old and dying within six months thereafter without ever having moved from the old family home, and the other relatives named being then respectively eighty and forty years of age.

2: Whether or not, when the undisputed evidence shows as recited in paragraph 1 above, for the purposes of a charitable deduction, a "standard was fixed in fact and capable of being stated in definite terms of money", within the terms of *Ithaca Trust Co. v. United States*, 279 U. S. 151, 73 L. Ed. 647, 49 S. Ct. 291, and the conditions on which the extent of invasion of the corpus depends are fixed by reference to some "readily ascertainable and reliably predictable facts," within the terms of *Merchants National Bank v. Commissioner*, 320 U. S. 256, 88 L. Ed. 35, 64 S. Ct. Rep. 108.

3: When the undisputed evidence shows as recited in paragraph 1 above, and further shows that, at the time of testator's death and for some years prior thereto, the income from the Texas community estate of himself and wife, which had always been operated by testator as a unit and was thereafter so operated by the trustee, was about $620.00 per month, which was enough to meet the fixed monthly demand of $250.00 per month to the sister

and niece but insufficient to provide the widow with her accustomed necessities and comforts, costing $320.00 per month, and that at the time of the testator's death the widow was in declining health and had devised her property to the same charities as had her husband, upon whom she always depended: whether or not the probability of the invasion of the principal of the estate is so remote as to warrant the deduction of the full value of the principal as going to charity, under 26 U. S. C. A., Section 812(d).

4: Whether or not, when the undisputed evidence shows as recited in paragraphs 1 and 3 above, the intention is manifest in the will that the income from the widow's one-half of the community should be considered in determining whether it is necessary to invade the principal of the decedent's half in order to comply with the directions of the will as to maintenance of the widow, after making the required fixed payments to the sister and niece.

5: When the undisputed evidence shows as recited in paragraphs 1 and 3 above, whether or not, as a matter of federal estate tax law, the income from the whole Texas community estate must be first exhausted before the principal of the half devised could be invaded.

6: Whether or not, when the undisputed evidence shows as recited in paragraph 1 and 3 above, even if the cost of maintaining the widow in the manner provided in the will be taken entirely out of the corpus of the decedent's half of the community estate, the extent of the invasion of such corpus is capable of accurate calculation on an actuarial basis at the time of death, under sections 81.44 and 81.10 of Treasury Regulation 105.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1: In denying the right of petitioner to recover herein, the Circuit Court of Appeals necessarily determined all of the questions presented, and they are all substantial questions of federal law.

2: The Circuit Court of Appeals directly decided each of the first two of the questions presented and thus decided important questions of federal law in a way probably in conflict with the applicable decisions of this Court in *Ithaca Trust Co. v. United States*, 279 U. S. 151, 73 L. Ed. 647, 49 S. Ct. 297,* and *Merchants National Bank v. Commissioner*, 320 U. S. 256, 88 L. Ed. 35, 64 S. Ct. 108**.

3. In deciding the first two of the questions presented, the Circuit Court of Appeals has rendered a decision on federal law believed to be in conflict with the decisions of other Circuit Courts of Appeal on the same matter, to-wit, *Lucas v. Mercantile Trust Co.*, 43 F. (2) 889 (CCA-8th)†, and *Wetherill v. Commissioner*, 150 F. (2) 1010, (CCA-9th), approving 4 Tax. Ct. 678††.

4: In deciding the first three of said questions, the Circuit Court of Appeals has rendered a decision believed to be in conflict with its own previous decision on the same matter in *First National Bank v. Snead*, 24 F. (2) 186‡.

5: In deciding the third question presented, the Circuit Court of Appeals has rendered a decision believed to be in conflict with the decisions of other Circuit Courts of Appeal in *Commissioner v. Wells-Fargo*, 145 F. (2) 130 (CCA-9th),

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* post, pp. 19, 35
** post, pp. 18, 21
† post, pp. 22, 25, 27
†† post, p. 22
‡ post, pp. 22-3, 29

and *Commissioner v. Robertson*, 141 F. (2) 855 (CCA-4th)‡‡.

6: In deciding the last question presented, the Circuit Court of Appeals has erroneously decided an important question of federal law which should be settled by this Court.

7: All of the questions presented and decided are questions of importance in federal estate tax law, and it is to the public interest to have them decided by this Court of last resort, especially in view of recurring expressions from the courts and tax authorities that this Court, in the *Merchants Bank case**, intended to narrow the scope *of the Ithaca Trust Co. case***.

8. The division of opinion in the Circuit Court of Appeals on an important question of federal law and the strength and thoroughness of the dissenting opinion thereon indicate the urgent need for clarification by this Court, as a matter of public policy, especially in view of the majority opinion's having completely ignored the applicable decisions above cited.

WHEREFORE, your petitioner prays that writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and proceedings of the said court had in the case numbered and entitled on its docket No. 12,228, National Bank of Commerce of San Antonio, Independent Executor and Trustee of the Estate of W. G. Higgins, Deceased, Appellant, vs. Frank Scofield, Collector of Internal Revenue, Appellee, to the end that this cause may be reviewed and determined by this Court, as provided by the statutes of the United States, and that

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‡‡ post, p. 35 * post, pp. 19, 35 ** post, pp. 18, 21

the judgment herein in the Circuit Court of Appeals be reversed by this Court, with direction that judgment be rendered in favor of the petitioner; and for such further relief as to this Court may seem proper.

DATED, October....., 1948.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE COURTS BELOW.

The trial court handed down an opinion, consisting principally of excerpts from pertinent statutes and regulations, findings of fact and conclusions of law (R. 302-13). This opinion has not been published.

The opinion of the Circuit Court of Appeals is reported in 169 Fed. (2) 145, and is found in the record on page 322.

II.

JURISDICTION.

A detailed statement with respect to the jurisdiction of this Court is found under corresponding caption in the petition, pages 6 to 7 hereof, and a statement of the reasons relied on for the allowance of the writ is also set forth in the petition, pages 10 to 11, to both of which reference is here made.

United States Trust Co. v. Commissioner, 296 U. S. 481, 80 L. Ed. 340, 56 S. Ct. 329, is a tax case in which certiorari was granted on conflict of decision, turning upon the construction of particular instruments.

III.

STATEMENT OF THE CASE.

A statement of all the matters material to this controversy has been made under the first two sections of the petition herein (ante, p. 2), which is here adopted and made a part of this brief.

IV.

SPECIFICATIONS OF ERROR.

1: The Circuit Court of Appeals erred in holding that there was "no standard provided in the will by which such invasion (of the corpus of the trust estate), if any, (as required by the will) could have been accurately calculated."

2: The Circuit Court of Appeals erred in holding that "at the time of the testator's death, the ascertainment of the amount that would remain (and ultimately go to charity) was largely a matter of conjecture."

3: The Circuit Court of Appeals erred in holding that "in consequence of the inability to ascertain, at the time of testator's death, the amount that would ultimately go to charity, no deduction under the statute and regulations for charitable bequests was allowable."

4: The Circuit Court of Appeals erred in holding that, under the undisputed facts, the amount going to charity was not "presently ascertainable."

5: The Circuit Court of Appeals erred in holding that the trustee, under the will, was authorized to exercise an "uncontrolled discretion" in providing a home or "a location of her (the widow's) choosing."

6: The Circuit Court of Appeals erred in holding that the choice of a place to live, given to the widow by the will, was subject only to "the vagaries and vicissitudes that attend an aged widow."

7: The Circuit Court of Appeals erred in holding that the discretion reposed by the will in the trustee and the widow were "such indeterminate and variable factors that the ancient criterion of 'judging the future by the past' should not be applied here as a formula for ascertaining, in praesenti, the amount that will remain when the discre-

tion, the vagaries and the vicissitudes have been resolved into tangibility by the widow's death."

8: The Circuit Court of Appeals erred in holding that "the issue is one of fact, on which the lower court found against the taxpayer on evidence that supports its finding."

9: The Circuit Court of Appeals erred in overruling petitioner's contention "that as a matter of fact (resolved by the evidence into a matter of law) there is no real probability that the principal devised would be invaded to any substantial extent."

10: The Circuit Court of Appeals erred in overruling petitioner's contention that, "as a matter of law, the income from the whole community estate must be first exhausted before the principal of the half devised could be invaded."

11: The Circuit Court of Appeals erred in overruling petitioner's contention that, even if the $320.00 per month found by the trial court to be the cost of maintaining the widow, liberally "provided with the necessities and comforts in life to which she is accustomed," be taken entirely out of the principal of the decedent's half of the community estate, the extent of the invasion of such principal was capable of accurate calculation on an actuarial basis, at the time of death, under Sections 81.44 and 81.10 of Treasury Regulation 105.

V.

ARGUMENT.

OUTLINE OF ARGUMENT AND AUTHORITIES.

Widow's Present Accustomed Necessities and Comforts is the Standard fixed:

Ithaca Trust Co. v. United States, 279 U. S. 151, 73 L. Ed. 647, 49 S. Ct. 291;

Merchants National Bank v. Commissioner, 320 U. S. 256, 88 L. Ed. 35, 64 S. Ct. 108;
First National Bank v. Snead, 24 F. (2) 186 (CCA-5th);
Lucas v. Mercantile Bank & Trust Co., 43 F. (2) 39 (CCA-8th);
Wetherill v. Commissioner, 4 Tax Ct. 678, petition for review dismissed, 150 F. (2) 1010 (CCA-9th).

Liberal Construction of Will to Encourage Charitable Bequests:

Y. M. C. A. v. Davis, 264 U. S. 47, 68 L. Ed. 558, 44 S. Ct. 291;
Helvering v. Bliss, 293 U. S. 144, 79 L. Ed. 246, 55 S. Ct. 240;
Lucas v. Mercantile Bank & Trust Co., supra;
Commissioner v. F. G. Bonfils Trust, 115 F. (2) 788 (CCA-9th);
Commissioner v. Robertson's Estate, 141 F. (2) 855 (CCA-4th);
Norris v. Commissioner, 134 F. (2) 796 (CCA-7th).

Issue One of Law:

Baumgartner v. United States, 322 U. S. 665;
Lucas v. Mercantile Bank & Trust Co., supra.

Will Implies Widow's Choice of Home Restricted to Same Standard as Maintenance:

Lucas v. Mercantile Bank & Trust Co., supra.
Hall v. Hall, 283 S. W. 957 (Ky.);
Note, 101 A. L. R. 1468.

Trustee's Discretion a Controlled One:

First National Bank v. Snead, supra;
United States National Bank v. Sullivan, 69 F. (2) 412 (CCA-7th);

Boyd v. Frost National Bank, 196 S. W. (2) 497 (Tex.);
Sells v. Delgado, 70 N. E. 1036 (Mass.);
Greenwich Tr. Co. v. Converse, 122 Atl. 916 (Conn.).

Under Circumstances, there was No Real Probability of Invasion of the Principal:

Ithaca Trust Co. v. United States, supra;
First National Bank v. Snead, supra;
Commissioner v. F. G. Bonfils Trust, supra;
Commissioner v. Robertson's Estate, supra;
Commissioner v. Wells-Fargo Bank & Trust Co., 145 F. (2) 130 (CCA-9th);
Jack v. Commissioner, 6 Tax Ct. 241.

ARGUMENT AND DISCUSSION OF AUTHORITIES.

Widow's Present Accustomed Necessities and Comforts is the Standard Fixed.

Clause (d) of Col. Higgins's will directs the trustee, who takes title to everything, (1) "to liberally provide" for his beloved wife, (2) to maintain "her in our home or a location of her choosing", (3) to provide her "with the *necessities and comforts in life to which she is accustomed*,"* and (4) to "use such *reasonable* sums from the principal from time to time as it, in its sole discretion, may deem *necessary* for the carrying out of" these provisions. Then from clauses (b), (c) and (e) of the will, it appears that, aside from furnishing a sister and niece certain fixed sums, as far as possible out of income, everything else ultimately goes to charity. (R. 14-5).

It is clear from these provisions that the testator, besides helping his collateral kin, intended to safeguard

* Emphasis here and hereafter in this brief is ours.

his widow against any possibility of want, but trusted petitioner alone to do these things and then only with the restriction that it use, if possible so to do, only the income from his estate, giving, however, to the trustee the right to invade the principal when *necessary* to provide her with her accustomed necessities and comforts. Above all else, though, the paramount disposition made is to *charity*, especially as to the corpus of the estate.

The testator thus made a *definite yardstick* for the trustee's maintenance of his widow, obviously hoping that by this measurement the trustee could maintain her without encroachment upon the principal of his estate, for the will authorizes the trustee to invade the principal only for such *reasonable* sums as "it may deem *necessary*" for the purpose of so maintaining her.

On account of his love for his wife, the testator has expressly allowed the trustee a liberal use of this yardstick, but it will be noted that the will does not say nor remotely imply that "my said trustee shall exercise its discretion with liberality to my said wife and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries", as did the will in *Merchants National Bank v. Commissioner*, 320 U. S. 256, 88 L. Ed. 35, 64 S. Ct. 108. The yardstick does not include the idea of her "happiness", and the will does not say nor imply that the trustee may liberally invade the principal for just any purpose, nor that it may invade the principal at all, except as *necessary* to liberally provide the widow "with the *necessities and comforts in life to which she is accustomed.*"

Under this language in the will, "the conditions on which the extent of invasion of the corpus depends are fixed by reference to some readily ascertainable and reliably predictable facts" (*Merchants Bank case*, supra), for the reason that the undisputed evidence here shows, as found by the trial court, that "the cost of maintaining Mrs.

Mary Jane Higgins in the manner provided for in her husband's will was about $320.00 per month." (R. 310; ante, p. 5, subdivision 3).

In *Y. M. C. A. v. Davis*, 264 U. S. 47, 50, 68 L. Ed. 558, 44 S. Ct. 291, this Court says:

> "Congress (in 26 U. S. C. A., Sec. 812[d]) was in reality dealing with the testator before his death. It said to him: 'If you will make such gifts (to charities), we will reduce your death duties and measure them, not by your whole estate, but by that amount less what you give.'"

With even more clarity and precision, this Court, in *Ithaca Trust Company v. United States*, 279 U. S. 151, 73 L. Ed. 647, 49 S. Ct. 291, speaking, as it were, to all prospective testators, through Mr. Justice Holmes, said that "the standard was fixed in fact and capable of being stated in definite terms of money," entitling the estate to charitable deduction so measured, when the trustee under the will was permitted to use "from the principal any sum 'that may be *necessary to suitably* maintain her (the widow) in *as much comfort as she now enjoys.*'"

There can be no reasonable doubt, in view of the close approximation of the language used, that the will of Col. Higgins was modeled on the will involved in the *Ithaca Trust Company case*, upon the basis of the promise made by Congress in the terms of the law that Col. Higgins's estate would thereby enjoy the benefit of the charitable deductions offered. Yet that case is completely ignored in the majority opinion, although it has always by us been pressed upon the court's attention.

That promise made by Congress and then already definitely applied by this Court has, in this case, been repudiated by the government. In attempting to justify such repudiation, fine-spun distinctions are sought to be

made, it is true, between this and the *Ithaca Trust Company case*. Such, for instance, is the suggestion that, while the widow in that case was to be maintained "in as much comfort as she *now* enjoys", the widow in this case was to be "provided with the necessities and comforts in life to which she is accustomed." The use of the present tense, "*is* accustomed", is quite sufficient to import the meaning of "now", and the use of the latter as well would have been mere tautology.

It has many times been said by the court to be the purpose of Congress, in allowing deductions of charitable dispositions, to encourage gifts to charity, and, therefore, doubtful language in wills should be so construed. *Helvering v. Bliss*, 293 U. S. 144, 151, 79 L. Ed. 246, 55 S. Ct. 240; *Lucas v. Mercantile Bank & Trust Co.*, 43 F. (2) 39, 43 (CCA-8th); *Commissioner v. Robertson's Estate*, 141 F. (2) 855, 859 (CCA-4th); *Commissioner v. F. G. Bonfils Trust*, 115 F. (2) 788, 791 (CCA-9th); *Norris v. Commissioner*, 134 F. (2) 796, 801 (CCA-7th). Yet the unquestioned humane purposes of the will here involved are, in the majority opinion of the Circuit Court of Appeals, frustrated and destroyed by a strained construction of the will that snatches the bulk of this estate away from the orphans for whom it was intended, to give it to the government, contrary to the acknowledged purpose of its deceased owner, the testator.

Merchants Bank Case Completely Distinguished.

On the question of law as to whether the widow's present accustomed necessities and comforts fix such a standard as to render the value of the interest finally going to charity "presently ascertainable and hence severable", it is believed that the majority opinion of the Circuit Court of Appeals stands in complete isolation from all other authorities.

While the standard for maintenance of the widow is fixed in the terms of the will by "the necessities and comforts in life to which she is accustomed," and is shown by the undisputed evidence to be stated in definite terms of money as being $320.00 per month, the majority opinion expressly refuses to judge the future by the past, disregards the brief life expectancy of this eighty-two year old widow, puts aside the fact that the widow's maintenance actually, on account of her early death, only cost about $1900.00 (ante, p. 5), and gives to the government what would otherwise go to charity.

Certainly, there is nothing in the *Merchants Bank case* to warrant the decisions below in this case. The Court's opinion in that case entirely puts aside any lurking idea that it was intended thereby to modify either what was held or said by this Court in the *Ithaca Trust Company case.* Each time that keystone decision is mentioned in this Court's opinion in the *Merchants Bank case,* it is carefully and pointedly distinguished, as by saying that the standard attempted to be fixed in the later case was not "based on the widow's prior way of living", nor on "readily ascertainable and reliably predictable facts", nor "capable of being stated in definite terms of money"; all of which things stand in contradistinction to the will in the *Ithaca Trust Company case* and in the case at bar. Finally, this Court, by the following language, marks the category that comprehends that case and distinguishes the *Ithaca Trust Company case* and this one:

> "Introducing the element of the widow's 'happiness' and instructing the trustee to exercise its discretion with liberality to make her wishes prior to the claims of residuary beneficiaries brought into the calculation elements of speculation too large to overcome, notwithstanding the widow's previous

> mode of living was modest and her own resources substantial."

In addition, there is in this Court's opinion in the *Merchants Bank case*, a clear implication of its approval of what was said by the Circuit Court of Appeals in that case (132 F. [2] 483, 486), to-wit:

> "The respondent (taxpayer) cites *First National Bank of Birmingham v. Snead*, 24 F. (2) 186; *Hartford v. Eaton*, 36 F. (2) 710, *Lucas v. Mercantile Bank & Trust Co.*, 43 F. (2) 39, and *Commissioner v. Bonfils Trust*, 115 F. (2) 788, as supporting its position. These cases are *clearly distinguished*. The first three deal with support and maintenance of the widow and *clearly fall within the rule laid down in the Ithaca Trust Company case*. The position which we take in the instant case is *not at all inconsistent with those holdings*."

As shown by the *Notes* in 149 A. *L. R.* 1351-62 and 169 *A. L. R.* 1527, the category of cases anticipating and following the *Merchants Bank case* comprehends ones where the wills use the term "happiness", "desire", "financial assistance", and "pleasure", all of which stand in contradistinction to the other class of cases anticipating and following the *Ithaca Trust Co. case*, where the wills use the words "comfort", "comfort and support", "support and maintenance", and "need." Illustrative of this last group are: *First National Bank v. Snead*, 24 F. (2) 186 (CCA-5th); *Lucas v. Mercantile Bank & Trust Co.*, 43 F. (2) 39 (CCA-8th); *Wetherill v. Commissioner*, 4 Tax Ct. 678 (petition for review dismissed, 150 F. [2] 1010 [CCA-9th]).

Singularly enough, the *Snead case*, supra, is ignored in the majority opinion, although that was a decision in point

by the same court. The will in that case left the residue of the estate to the widow and the bank as joint trustees, with direction to distribute the estate to certain charities upon her death, and the will contained the following provisions:

> "If at any time in the opinion of said trustees the net income from said estate shall not be *sufficient for the proper support and comfort* of my said wife, the trustees shall pay over to my said wife such additional sum or sums out of the principal of said trust estate as to them may seem necessary or desirable for such purpose."

The court, in upholding the charitable deduction, said:

> "The testator intended to make sure that the beneficiary would have means adequate for her maintenance in a manner suitable or appropriate to the station in life to which she was accustomed, with the comfort resulting from being secure against want or deprivation of what was reasonably needed for her physical, mental, or spiritual ease or enjoyment of the kind of life usually led by her * * * The authority of the trustees to make payment to the widow out of the corpus of the trust estate was dependent upon their forming the opinion that the net income from the trust estate is not sufficient for *proper comfort and support* of the widow."

The kind of "rough guesses" and "approximations" referred to in the *Merchants Bank* opinion, as quoted in the opinion in the case at bar, are shown to be such as involved in *Humes v. United States,* 279 U. S. 151, 73 L. Ed. 647, 49 S. Ct. 291, whether a fifteen year old girl would marry, or, if she did, would die without issue before the age of thirty, thirty-five or forty. On the other hand, the sum of $320.00 is here shown without dispute to be

the monthly cost of maintaining Mrs. Higgins in the manner provided in her husband's will, and that amount is, therefore, the standard "stated in definite terms of money", within the requirement of the *Ithaca Trust Company case.*

This Case Turns on a Question of Law.

Perhaps the real basis of the adverse decision and holding of the court below is to be found in the final paragraph of the majority opinion, where it is said that *"the issue is one of fact on which the lower court found against the taxpayer* on evidence that supports its finding."

The only finding of fact unfavorable to petitioner made by the lower court is this *ultimate* one:

> "Under the terms of the testator's will it was impossible at the date of his death to determine how much of the principal of the trust set up thereunder would be diverted * * * to 'liberally provide' for his wife, 'maintaining her in our home, etc.,'" citing the *Merchants bank case* (R. 312).

Under its conclusions of law, the trial court finds against petitioner, first, because this maintenance provision "is uncertain and not limited to a standard, etc.," and, second, "because the estate of the decedent could not, in reasonable probability, yield an income sufficient to pay the charges fixed" by the will (R. 312).

The second reason amounts to saying that $570 ($250 to sister and niece and $320 to widow) is more than $310 (income from his one-half), but it does not sustain the judgment. The first reason is the real essence of the above ultimate finding, since, if there was a standard fixed in the will therefor, the amount of diversion for maintenance of the widow could be determined.

These are legal conclusions, not binding the apellate courts herein. *Helvering v. American Dental Co.*, 318 U. S. 322, 330-1.

With reference to the above ultimate 'fact finding' it may well be said, as it was by this Court in *Baumgartner v. United States*, 322 U. S. 665, 671, "though labelled 'finding of fact', it may involve the very basis on which judgment of fallible evidence is to be made. Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of 'fact' that precludes consideration by this Court."

No finding or conclusion was made by the trial court as to whether the value of the trust was "presently ascertainable."

As stated in the dissenting opinion, there is no conflict whatever in the evidence. All of it came from one side, the taxpayer's, and credibility of witnesses is not drawn in question. The real substance of the whole case is found in the decedent's will and nearly contemporary personal account book and budget, the latter giving necessary meaning to the language used in the will. Rule 52(a), precluding review of findings of fact "unless clearly erroneous", has no application under such circumstances, and the appellate court remains free to draw its own ultimate fact conclusions. *Harris Stanley Coal & Land Co. v. Railway Co.*, 154 F. (2) 450, 452-3 (CCA-6th); *Tyree, Chemist, Inc. v. Thymoborine Lab.*, 151 F. (2) 621, 624 (CCA-7th); *Stubbs v. Fulton National Bank*, 146 F. (2) 558 (CCA-5th).

The construction of a will, in the light of undisputed facts surrounding its execution, presents only a question of law. 53 *Am. Jur.* 214-5, 229. Nobody claims that this will is ambiguous, disputes the factual background, nor really draws different factual inferences from the evidence.

Beyond doubt, this childless old man was trying to dispose of his property to charity, and to enjoy incidentally the tax benefits offered by Congress for so doing; and at the same time intended to protect his loved ones from want during their lives. The only question is one of law, whether the pattern he followed in framing his will stood on the one hand under the protection of the *Ithaca Trust Co. case*, or fell on the other hand under the sword of the *Merchants Bank case*.

If the determinative matter here at issue was not one of law, it would be difficult to understand this Court's action in reversing the Court of Claims in the *Ithaca Trust Co. case* and the Tax Court in the *Merchants Bank case*, or the action of the Circuit Court of Appeals in reversing the district court in the *Snead case*, all on this precise question of law. All would have been affirmed on the trial courts' findings.

In *Lucas v. Mercantile Bank & Trust Co.*, 43 F. (2) 39, the Eighth Circuit Court of Appeals said, with reference to the same issues as here involved:

> "The only questions with which we are concerned in this appeal are questions of law * * * The only questions here relate to the construction of a will * * * Does this will vest in the widow an unlimited discretion to withdraw the principal of the estate for her comfort, maintenance and support?"

This Will Implies that the Widow's Choice of a Home is Restricted to the Same Standard as her Maintenance.

This is one of the trial court's *conclusions of law*:

> "The wife had the right to choose her place of residence and require the trustee to pay the cost. As to this last item, no discretion, in my opinion, is vested in the trustee." (R. 312).

The precise basis upon which the majority opinion would have distinguished the *Ithaca Trust Co. case*, if it had not seen fit to ignore that case, is expressed in the two next to last paragraphs of the majority opinion, where it construes the will somewhat in line with this conclusion of law by the trial court, to empower the trustee to exercise an "uncontrolled discretion" in buying a new home for the widow and at the same time to empower her, according to "the vagaries and vicissitudes that attend an aged widow" (that is to say, whim, fancy or change of condition), to choose some luxurious abode, beyond the measure of what she had been accustomed, and the trustee would have to buy it for her and maintain her there, regardless of cost.

Even though subdivision (d) were construed as giving the widow the unrestricted right to choose her home, the will certainly does not give her, but only the trustee, the title to and the power to use either income or principal of this estate for any purpose. Thus, her purchase of a costly home could not infringe upon the decedent's estate, except only as it rendered her maintenance there more expensive than it would have been in the existing family home, where she actually continued to live as a recluse until she followed him in death less than six months later. (Ante, p. 6).

But of course it would be utterly unreasonable to construe this provision of the will as meaning that, while the testator wanted his wife restricted in general to "the necessities and comforts in life to which she is accustomed", he intended to give her *unbounded discretion* to pick a place of abode where she could not be maintained except by exceeding "the necessities and comforts in life to which she is accustomed" in the then existing home. Since the principal of the estate was to be invaded only through use by the trustee of "such reasonable sums" as the trustee

"may deem necessary" to provide her with her accustomed necessities and comforts, there must also be implied, in order to carry out a reasonably consistent purpose, that the widow's right to pick her place of abode was limited to the kind to which she was accustomed, such as the home in which she lived with her husband, and in which she died a few months later.

After all, this is a matter of plain common sense. The language of subdivision (d) does not require any such construction as given it by the courts below. Everybody these days writing wills is mindful of tax angles, and so, Col. Higgins, being charged with knowledge of the law, under the theory upon which this case was determined by the Circuit Court of Appeals, must have known that by this little quirk about the place of his wife's abode he had frustrated his whole testamentary plan and purpose, and, instead of protecting his estate for charity, he had thereby delivered it over to the Internal Revenue Collector.

The case of *Lucas v. Mercantile Bank & Trust Co.*, 43 F. (2) 39 (CCA-8th), in principle determines the point in question, but instead of a choice of homes, the question there was as to whether the widow was vested with "an unlimited discretion to withdraw the principal of the estate for her comfort, maintenance and support." The will there directed the trustee to pay to the widow the net income, "or, if need be, such part of the corpus thereof as may be necessary for the comfort, maintenance and support of my wife," and that her request to the trustee that a sum was needed should be the trustee's authority for such payment. The court said:

> "We are satisfied that here the amount necessary for the comfort, maintenance and support of the widow was not left entirely to her discretion * * * * If a trustee, upon a mere written notice of the widow that she needed the entire corpus of the estate for her comfort, maintenance and support,

> should turn over the same to her, he would, in our judgment, be guilty of a dereliction of duty. Certainly, the trustee was to exercise some control. Why a trustee at all if the widow, if she desired, could take the entire estate for her comfort and convenience? * * * * The entire will shows that the power of the widow is limited and restricted by the judgment of the trustee. The desire of the testator is apparent. His humane purposes, after providing amply for his widow, to assist unfortunate and afflicted humanity, should not be destroyed by a strained and almost ridiculous construction of the will."

Applying that case to this one: Certainly, petitioner was to exercise some control over the widow's choice of a home. Why the trusteeship if the widow could, should she so desire, demand an unreasonable part of the estate for the purchase or maintenance of a home? The entire will shows that the power of the widow is limited and restricted by the judgment of the trustee as to whether the home chosen was reasonably necessary on the standard of "the necessities and comforts in life to which she is accustomed."

In a Note in 101 A. L. R. 1468, it is said, with a citation of cases from fourteen jurisdictions, to which may be added *Hall v. Hall,* 283 S. W. 957 (Ky.):

> "As a general rule, in the absence of a clear express or implied condition to the contrary, the beneficiary of a trust or an agreement for support is entitled to such support at such place as he may choose to reside, *under reasonable limitations which the law impliedly imposes only for the purpose of preventing needless expense.*"

Much more certainly must the limitation of a beneficiary's choice of a home be implied from the text of a will that expressly declares that she is entitled in main-

tenance to nothing beyond "the necessities and comforts in life to which she is accustomed" and which affirmatively restricts the trustee to the use of "such reasonable sums from the principal" as it "may deem necessary" for the effectuation of the provision for her maintenance.

The "Sole Discretion" of the Trustee is here a Controlled Discretion.

Apparently, because the discretion of the trustee under subdivision (d) of this will is a "*sole* discretion", the majority opinion implies that it is an "*uncontrolled* discretion." This does violence to the plainly expressed limitations upon the trustee's discretion, distorts the meaning of the testator and assumes that the trustee will violate its duty under the will.

In this connection, the following language from the opinion in a similar case, *First National Bank v. Snead*, 24 F. (2) 186, 188 (CCA-5th), is pertinent:

> "They (the trustees) are not empowered arbitrarily to invade the corpus of the trust estate in the absence of existence of a state of facts furnishing support for a reasonable opinion or conclusion that the net income from such estate is insufficient for the proper support and comfort of the widow, and the exercise of the discretion vested in them is subject to judicial revision and control."

In *United States National Bank & Trust Co. v. Sullivan*, 69 F. (2) 412 (CCA-7th), it is said, with reference to a verbally unlimited "absolute discretion" reposed in a trustee, that "discretion to a trustee does not mean an arbitrary or unlimited or absolute discretion, but a reasonable one."

The Supreme Court of Texas in *Boyd v. Frost National Bank*, 196 S. W. (2) 497, 504, says, with reference to the expression in a will that the trustee might "in its absolute

discretion" select, charitable associations upon which to bestow the estate:

> "The discretion lodged in the trustee is not to be construed a license to abuse the trust, but a responsibility faithfully to execute it. Even though vested with a broad discretion, the trustee must exercise it reasonably, never arbitrarily. Reasonableness, diligence and fidelity must characterize the trustee's conduct, and the courts will not tolerate any departure from those high standards."

In *Sells v. Delgado*, 70 N. E. 1036, wherein the will provided that the trustees "shall be the *sole* judges and I leave it entirely to their discretion" about the distribution of the principal, the Supreme Judicial Court of Massachusetts held that the use of such words would not defeat the general purpose to have the trustees' powers exercised in good faith. See also *Greenwich Trust Co. v. Converse*, 122 Atl. 916 (Conn.).

Thus, the freedom of choice given by the will to the widow could even be subject to "the vagaries and vicissitudes that attend an aged widow" and yet nothing more would be affected, by either the purchase or maintenance of an expensive home, except the income of the estate. For the trustee only is authorized to use the principal of the estate, and its authority is limited to the use of "such *reasonable* sums" therefrom as deemed *"necessary* for the carrying out of the provisions" for maintaining her "in a location of her choice." If an *unreasonable* sum were required by her for this purpose, the trustee would be in duty bound to refuse it. Should it not do so, the charities named in the will could, through the courts, compel it so to do.

Besides, with title to everything vested in petitioner, under 4(a) of the will, how could the widow herself have touched even the income?

Alternative Conclusions Entitling Petitioner to Judgment Herein.

In *Paul on Federal Estate and Gift Taxation*, Sec. 12.26, it is said, with reference to the deduction of a charitable bequest, subject to the maintenance of a life tenant:

> "The power to invade the corpus must, however, enable the court to determine the practical impossibility of invasion or the amount of invasion, if any invasion is indicated * * * * There must always be a standard by which to calculate (a) that invasion is highly improbable so that there is no lack of definiteness of prospect that the remainder will go to charity, or (b) the amount of diminution of the charitable remainder if there is likelihood of invasion." See *Newton Trust Co. v. Commissioner*, 160 F. (2) 178-9 (CCA-1st).

As heretofore shown, there is in this will a standard fixed by which to determine the cost of the widow's maintenance ($320.00 per month), as well as the cost of the maintenance of the sister and niece ($250.00 per month), and a court then, with reference to the income ($620.00 per month from the entire community estate), is authorized (a) to conclude that there will be no invasion of the principal, or, alternatively, without necessary reference to the income, (b) to conclude upon the extent of the invasion of the principal on an actuarial basis, in the manner shown in Sections 81.44 and 81.10 of Treasury Regulation 105. In other words, granting that there is a standard fixed for measurement, it follows that petitioner is entitled to judgment, for in any event the extent of invasion of principal is capable of determination by the trial court upon remand, so that justice may be done.

Petitioner, however, contends that the undisputed evidence here showed, as of time of decedent's death, that there should be no invasion of the principal. In the first place, it contends that the income from the whole community

estate must be first exhausted, for the reason that under the 1942 amendment of the Federal Estate Tax Law (26 U. S. C. A., Sec. 811), which has now been repealed, the tax was here imposed upon the entire net community estate, and under the Texas statutes as construed in *Barbour v. Commissioner*, 89 F. (2) 474 (CCA-5th), all income from the community estate after death was taxable to that estate and not to the survivor. We submit this contention without further argument.

In the second place, petitioner contends that under the undisputed evidence any invasion of the principal was only remotely possible and so improbable as not to diminish from the full value of the principal as a deduction going to charity.

Testamentary Intent Negatives any Invasion of Principal.

This last mentioned contention on petitioner's part has a double aspect, one of which is most forcefully presented by the dissenting opinion in this case. The other is apparently recognized but not stressed in the dissenting opinion, and, in brief, it is that, as a matter of construction of this will, under which the principal may be invaded only in case of its being necessary for the maintenance of the widow in the manner directed, the income from her share of the community property should be considered in determining whether such necessity exists.

There are apparently no authorities on this subject among either the Texas or federal decisions, but the case most nearly in point is probably a decision of the New York Court of Appeals in *In re Martin's Estate*, 199 N. E. 491. There the will under construction required payment of the net income "and such part of the principal thereof as she (the beneficiary) may require for her support, care and comfort during her natural life," with remainder

to certain charities. After distinguishing the opposite situation, the court says:

> "If, however, the gift is of income coupled with a provision that the principal may be invaded in case of need, the private income of the beneficiary must be considered in determining whether such need exists."

The court accordingly concluded that the beneficiary was entitled to invade "the principal of the trust fund, only in the event the income from the trust fund, supplemented by her independent income, shall be insufficient for her proper care, support and comfort."

See also *Stempel v. Middletown Trust Co.*, 15 Atl. (2) 305 (Conn.); *In re Willys' Estate*, 48 Atl. (2) 789 (N. J.); *Board v. Safe Deposit & Trust Co.*, 46 Atl. (2) 281 (Md.); *Peckham v. Newton*, 4 Atl. 758 (R. I.).

The testamentary intent in this instance is manifest that the income from the widow's one-half of the community estate should be considered in determining whether it is necessary to invade the principal of the decedent's half, because it would be utterly unreasonable to suppose that the testator, knowing as he did the income from the community estate and the cost of the maintenance of his wife, which alone was more than the income from his one-half of the estate, could have hoped to accomplish the purposes shown in his will, except by recourse to income from the entire community estate. It would have been absurd, under such circumstances, for him to direct the trustee to pay his niece and sister "out of income, if sufficient," and only to "use such reasonable sums from

the principal" for his wife as the trustee "may deem necessary" to maintain her in her accustomed manner of life.

There was No Real Probability of the Invasion of the Principal.

Regardless of this consideration, there was no real probability at the time of Colonel Higgins's death, that the principal devised by him to charity would be invaded for the maintenance of the widow and his sister and niece. The reasons for this conclusion, aside from those above mentioned as entering into the intent of the testator, are that, according to human nature and the common experience of mankind, it was altogether unlikely that the principal of the property devised to charity would be invaded for the widow's support. She was eighty-two years old when her husband died, of frugal habits and in failing health, and she is shown by her will to have devised her properties to the same charities as he had. She had nearly enough income from her half of the estate to take care of herself without appreciable invasion even of the income from her husband's one-half, and, perhaps most important of all, the evidence shows that the entire community estate was handled by petitioner, the trustee, as a unit. Under such circumstances, (See ante, p. 6) it would be unlikely that she would demand an invasion of the principal or that the trustee would find it necessary to make any.

In point of fact, the evidence shows that she survived her husband by just about six months and only a very small amount of the income was ever used by her at all. What is at stake here is not between the government and . . .

some private interest, but between the government on the one hand and the charities named in the will on the other.

Since, as stated in the dissenting opinion, "the evidence admits of only one reasonable conclusion" and "there is no sound basis whatever for the (opposite) conclusion," it follows, *as a matter of law*, that there is no probability of invasion of the principal and that the deduction must be allowed. (R. 328).

In the *Ithaca Trust Co. case* there was nothing, beyond the fact that "the income at the death of the testator, and even after debts and specific legacies had been paid, was more than sufficient to maintain the widow as required," as basis for this Court's conclusion that "there was no uncertainty appreciably greater than the general uncertainty that attends human affairs."

In this case, as in *Commissioner v. Wells-Fargo Bank & Trust Co.*, 145 F. (3) 130 (CCA-9th); *Commissioner v. F. G. Bonfils Trust*, 115 F. (2) 788 (CCA-10th); *First National Bank v. Snead*, 24 F. (2) 186 (CCA-5th), and *Jack v. Commissioner*, 6 Tax. 241, as well as in other cases cited in these opinions, there were present various weighty considerations. Thus, in the *Wells-Fargo Bank case*, supra, it was said, in upholding the right of full deduction of a charitable devise in arriving at a federal estate tax:

> "The trustees were empowered to apply such part of the principal as they deemed reasonable to assist the niece in case of her need 'on account of any sickness, accident, want or other emergency' * * * In brief, the test applied by * * * (the trustee) is whether, as a matter of fact there was any reasonable probability that the corpus would be

> so invaded * * * (At decedent's death), the niece was fifty-four years of age and possessed independent means valued at approximately $35,000.00 * * * With the income from her own securities, the income from her own securities, the income of the trust was more than sufficient for her ordinary needs * * * This court, in the *Bank of America case* (133 F. [2] 753), relied on the *Ithaca Trust Co. case*. We refused to follow the rule propounded by the Commissioner, that the mere existence of the legal power to invade the corpus of a trust in favor of a private individual defeats the charitable gift deductions, but rather looked to the actualities of the situation, found sufficient certainty of the value of the charitable bequest in the improbability of invasion of the corpus, and concluded that the deduction was allowable."

The court further cites, as supporting the rule adhered to by it, *Commissioner v. Robertson's Estate*, 141 F. (2) 855 (CCA-4th), and overrules the Commissioner's insistence that the *Merchants Bank* case modifies the rule.

Similar considerations prompted the reversal of the trial court in the *Snead case*, supra, wherein it is said that:

> "The exhaustion of the trust estate is so remote that a finding that, by reason of the existence of that power, the vested interests of the charitable institutions had no substantial value when the will took effect, would be *arbitrary and unwarranted.*"

All of the above cited cases, like the dissenting opinion herein, makes a realistic approach to the problem as to the probability of invasion of the principal, solving it by the undisputed evidence in the light of actualities and common experience. On the other hand, the courts below herein brush aside common experience, realities, and reasonable expectancies, in favor of theories that defy controlling authorities.

VI.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing the decision of the Circuit Court of Appeals herein.

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